Supreme Court, U.S.
FILED
MAY 13 1989
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 88-1628

In the Supreme Court of the United States

OCTOBER TERM, 1988

MICHAEL R. MILKEN, ET AL., PETITIONERS

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

WILLIAM C. BRYSON
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

DANIEL L. GOELZER
General Counsel

PAUL GONSON
Solicitor

JACOB H. STILLMAN
Associate General Counsel

ROSALIND C. COHEN
Assistant General Counsel

KATHARINE GRESHAM
Special Counsel
Securities and Exchange Commission
Washington, D.C. 20549

HIPK

QUESTIONS PRESENTED

1. Whether the court of appeals applied the proper standards for determining judicial disqualification under 28 U.S.C. 455(a).

2. Whether a petitioner seeking a writ of mandamus from a court of appeals ordering the disqualification of a trial judge must demonstrate a "clear and indisputable" right to mandamus relief.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	15
Conclusion	27
Appendix A	1a
Appendix B	4a

TABLE OF AUTHORITIES

Cases:

Ackermann v. *United States*, 340 U.S. 193 (1950) 23
Allied Chemical Corp. v. *Daiflon, Inc.*, 449 U.S. 33 (1980) 9, 21, 24
American Steel Barrel Co., Ex parte, 230 U.S. 35 (1913) 22
Bankers Life & Casualty Co. v. *Holland*, 346 U.S. 379 (1953) 21
Beard, In re, 811 F.2d 818 (4th Cir. 1987) 22, 24
Bell v. *Chandler*, 569 F.2d 556 (10th Cir. 1978) 22
Blizard v. *Frechette*, 601 F.2d 1217 (1st Cir. 1979) 26
Cement Antitrust Litig., In re, 673 F.2d 1020 (9th Cir. 1982), aff'd, 459 U.S. 1190 (1983) 22
Cleveland v. *Krupansky*, 619 F.2d 576 (6th Cir.), cert. denied, 449 U.S. 834 (1980) 22
Durhan v. *Neopolitan*, No. 88-2108 (7th Cir. Apr. 20, 1989) 25
Faulkner, In re, 856 F.2d 716 (5th Cir. 1988) 17, 25
Firestone Tire & Rubber Co. v. *Risjord*, 449 U.S. 368 (1981) 23
Gilbert v. *Little Rock*, 722 F.2d 1390 (8th Cir. 1983), cert. denied, 466 U.S. 972 (1984) 26
Gulfstream Aerospace Corp. v. *Mayacamas Corp.*, 108 S. Ct. 1133 (1988) 21
Ivan F. Boesky Securities Litigation, In re, MDL Docket No. 732, M21-45-MP 3, 5

Cases—Continued: Page

Kerr v. *United States Dist. Court*, 426 U.S. 394 (1976) . . . 21, 24
Klapprott v. *United States*, 335 U.S. 601 (1949) 23
LaBuy v. *Howes Leather Co.*, 352 U.S. 249 (1957) 22
Liljeberg v. *Health Services Acquisition Corp.*, 108 S. Ct. 2194 (1988) 15, 16, 17, 19, 23
Mallard v. *United States Dist. Court*, No. 87-1490 (May 1, 1989) 21, 22
Mitchell v. *Sirica*, 502 F.2d 375 (D.C. Cir.), cert. denied, 418 U.S. 955 (1974) 22
Moses H. Cone Memorial Hosp. v. *Mercury Constr. Corp.*, 460 U.S. 1 (1983) 9, 21
Parker v. *Connors Steel Co.*, 855 F.2d 1510 (11th Cir. 1988) 17
Pepsico, Inc. v. *McMillen*, 764 F.2d 458 (7th Cir. 1985) . . 22, 25
Phillips v. *Joint Legislative Committee*, 637 F.2d 1014 (5th Cir. 1981), cert. denied, 456 U.S. 960 (1982) 26
Pittsburgh v. *Simmons*, 729 F.2d 953 (3d Cir. 1984) 22
Placid Oil Co., In re, 802 F.2d 783 (5th Cir. 1986) 22, 24-25
Rodgers, In re, 537 F.2d 1196 (4th Cir. 1976) 25
Scarrella v. *Midwest Federal Savings & Loan*, 536 F.2d 1207 (8th Cir.), cert. denied, 429 U.S. 885 (1976) 22
S.J. Groves & Sons Co. v. *International Brotherhood of Teamsters, Local 627*, 581 F.2d 1241 (7th Cir. 1978) 26
Union Carbide Corp. v. *U.S. Cutting Service, Inc.*, 782 F.2d 710 (7th Cir. 1986) 25
United States v. *Balistrieri*, 779 F.2d 1191 (7th Cir. 1985), cert. denied, 475 U.S. 1095 (1986) 25
United States v. *Duell*, 172 U.S. 576 (1899) 21
United States v. *Horak*, 833 F.2d 1235 (7th Cir. 1987) 25
United States, In re, 666 F.2d 690 (1st Cir. 1981) 22
United States v. *0.21 Acres of Land*, 803 F.2d 620 (11th Cir. 1986) 22
United States v. *Wilensky*, 757 F.2d 594 (3d Cir. 1985) . . . 26
Will v. *Calvert Fire Insurance Co.*, 437 U.S. 655 (1978) . . 21

Statutes and rules:

28 U.S.C. 455 . . . . . 18, 24, 26
28 U.S.C. 455(a) 7, 9, 11, 15, 17, 19, 20, 25
28 U.S.C. 455(b)(1) 9

Statutes and rules—Continued: Page

28 U.S.C. 455(b)(4) 9, 19
28 U.S.C. 1407 2
28 U.S.C. 1651 22
Fed. R. App. P. 41(b) 12
Fed. R. Civ. P.:
Rule 60(b) 23
Rule 60(b)(6) 23

Miscellaneous:

H.R. Rep. No. 1453, 93d Cong., 2d Sess. (1974) .. 16, 18, 24, 26
S. Rep. No. 419, 93d Cong., 1st Sess. (1973) 16, 18, 26
13A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* (1984) 22

In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1628

MICHAEL R. MILKEN, ET AL., PETITIONERS

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals denying mandamus (Pet. App. A1-A32) is reported at 861 F.2d 1307. The opinions of the court of appeals on denying rehearing *en banc* (Pet. App. A33-A44) are not yet reported. The opinion of the district court (Pet. App. A45-A50) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on November 15, 1988. A petition for rehearing was denied on February 21, 1989. The petition for a writ of certiorari was filed on April 5, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Securities and Exchange Commission (SEC or Commission) brought this action on September 7, 1988,

alleging numerous violations of the federal securities laws by petitioners Michael R. Milken, Lowell J. Milken, and Pamela R. Monzert, and by Drexel Burnham Lambert Incorporated and Drexel Burnham Lambert Group Incorporated (collectively, Drexel), Cary Maultasch, and others.[1] The case was assigned to Senior United States District Judge Milton Pollack of the Southern District of New York. Petitioners and Drexel moved to disqualify Judge Pollack, who denied the motion. The court of appeals denied a petition for a writ of mandamus. Petitioners seek review of the court of appeals' denial of their mandamus petition.

1. a. In December 1986, almost two years before the Commission filed its suit, eleven shareholder class action suits were filed in New York and California, alleging that Ivan F. Boesky and Drexel, among others, violated the federal securities and civil anti-racketeering laws. See Pet. App. A4-A5. An additional private civil fraud action naming Boesky and Drexel as defendants was filed in March 1987. *Id.* at A5. Because of the relationship among the suits, the Judicial Panel on Multidistrict Litigation in July 1987 asked Chief Judge Brieant of the District Court for the Southern District of New York to consolidate the cases before Judge Pollack (to whom some of the cases had already been assigned) pursuant to 28 U.S.C. 1407. Pet. App. A5. The Panel's letter stated: "If related cases are filed in your district, we would anticipate that they would automatically be assigned to Judge Pollack." See SEC

---

[1] Petitioners and Maultasch are all present or former employees of the Drexel corporate defendants. The three other defendants in the case are Victor Posner, Steven Posner, and Pennsylvania Engineering Corporation. The complaint alleged that the defendants had devised and carried out a pervasive scheme involving insider trading, stock manipulation, fraud on Drexel's own clients, and numerous other violations of the federal securities laws. See Pet. App. A8.

Opp. to Mandamus Pet., Add. at 5a. The cases—known collectively as *In re Ivan F. Boesky Securities Litigation,* MDL Docket No. 732, M21-45-MP—were consolidated, and Judge Pollack presided over them for the next 14 months, issuing 36 case management orders and three published opinions in that time. Pet. App. A5.

b. In June 1988, Bain Venture Capital (Bain) signed a contract with the shareholders of Palais Royal, Inc. (Palais Royal) to purchase their stock in that company for $84.5 million in cash. See Pet. App. A6. Palais Royal, a closely held company whose shareholders consisted of Moselle Pollack, who is Judge Pollack's wife, and members of her family, operated a chain of department stores in Texas. Mrs. Pollack was to receive approximately $30 million from Bain for her interest. *Id.* at A17.

The sales contract gave Bain the exclusive responsibility for obtaining the financing it needed to consummate this leveraged buyout transaction. Pet. App. A6, A47. Indeed, at Bain's request, none of the selling shareholders had any contact with potential lenders. *Id.* at A6, A46. At the time the contract was being negotiated, Bain assured Shearson Lehman Hutton Inc. (Shearson), which was acting as financial adviser to Palais Royal's shareholders, that it had had discussions with potential lenders and investment bankers and that it was confident of its ability to secure the required financing. Chapman Aff. ¶ 3 (Oct. 4, 1988). Shearson itself also anticipated that financing could be obtained. *Ibid.* According to Shearson, as long as financing could be obtained, "it was of no relevance or concern to the selling shareholders which entity or entities provided the financing for the acquisition." *Id.* ¶ 4.

During the summer of 1988, Bain solicited several investment banks and institutional lenders about providing financing for the acquisition of Palais Royal (and, as part

of the same transaction, of another department store company). See Coffman Decl. ¶ 4(c) (Oct. 4, 1988) (reporting statements of Bain officer); Moseley & McCarthy Aff. ¶ 3 (Sept. 20, 1988). Bain contacted Drexel about financing in late July, one month after Bain and the shareholders had entered into the contract. *Id.* ¶ 4. Bain was still negotiating with other investment bankers at least as late as the end of August 1988 (see Pritchard Decl. ¶ 3 (Oct. 10, 1988) (reporting conversations with institutional lenders)), but Drexel ultimately was chosen. It was Drexel's potential role in arranging financing for Bain for its acquisition of Palais Royal that was to form the basis of the motion by petitioners and Drexel to have Judge Pollack disqualified.[2]

2. a. When the Commission filed the complaint on September 7, 1988, it designated the case as related to the private actions pending before Judge Pollack. Consistent with the Multidistrict Panel's directive and pursuant to local court rule, the case was assigned to Judge Pollack.[3]

---

[2] It is only *Drexel's* role in arranging financing that is at issue here, and Drexel no longer seeks to have Judge Pollack disqualified. There is no evidence in the record that petitioners themselves, as Drexel employees, were in any way involved in the transaction.

[3] Rule 15 of the Rules for the Division of Business Among District Judges of the Southern District of New York provided in relevant part:

> If it appears from the information and designation sheet or otherwise that a civil action or proceeding is related to a previously filed civil case still pending in this court, the newer case * * * shall be assigned to the same judge to whom the older case * * * was assigned * * *.
>
> Cases are related if they present common questions of law and fact, or arise from the same source or substantially similar transactions, happenings, events or relationships, or if for any other reason they would entail substantial duplication of labor if assigned to different judges.

Petitioners immediately responded with concerted efforts to keep the case from being assigned to him. See Pet. App. A18.[4]

b. In the late afternoon of Saturday, September 10, three days after the Commission's complaint was filed, two of Drexel's attorneys called Judge Pollack at his home, without first notifying counsel for the Commission, and informed him of Drexel's possible role in financing the Palais Royal transaction and his wife's interest in the transaction. Pet. App. A9; see *id.* at A19.[5] Judge Pollack

---

[4] According to an affidavit submitted by the SEC paralegal who filed the complaint, Lowell Milken's attorney was waiting in the Clerk's office and attempted " 'to prevent [her] from filing the Drexel court papers.' " Pet. App. A18. At the same time, according to an affidavit submitted by an SEC attorney, one of Michael Milken's attorneys, who was also in the Clerk's office, " 'threatened that if the Commission filed its action as one related to those pending before Judge Pollack', he would seek Rule 11 sanctions." *Ibid.* When the case was assigned to Judge Pollack, counsel for petitioners and Drexel immediately proceeded to the Judge's chambers and, arguing that the case was not related to the private suits, requested that he "refrain from accepting the case until they had an opportunity to consult with other counsel." *Id.* at A18-A19.

[5] According to the individual attorneys representing Drexel and petitioners, they first became aware of Mrs. Pollack's involvement in the Palais Royal transaction on September 9, 1988. See Pet. App. A8-A9, A24. There were, however, two earlier occasions on which the fact that Judge Pollack's wife was involved in the Palais Royal transaction was or might have been made clear to Drexel or to the attorneys' law firms.

First, Drexel was represented both in its negotiations with Bain and in the *Boesky* litigation by Cahill Gordon & Reindel (albeit by different attorneys from those representing Drexel in the present suit). In late July or early August 1988, Drexel and the law firm obtained copies of the Palais Royal/Bain contract, which listed "Mrs. Moselle Pollack" as a selling shareholder. See Pet. App. A7-A8. Drexel also

expressed disapproval of the *ex parte* contact and of the failure of Drexel's counsel even to try to notify counsel for the Commission before calling him. *Id.* at A79. At Judge Pollack's request, Drexel's attorneys notified counsel for the Commission, and a conference was convened for September 13 in the judge's chambers to discuss the matter. *Id.* at A75-A76. Although recusal was suggested at the conference, on the basis of the information provided Judge Pollack reacted negatively to the suggestion. No motion for disqualification was made at that time. See *id.* at A9.[6]

---

conducted a substantial "due diligence" inquiry into Palais Royal in July 1988. *Ibid.*

Second, in June 1988, Palais Royal shareholders Phyllis and George Asch, who are Mrs. Pollack's daughter and son-in-law, met with tax attorneys at Paul, Weiss, Rifkind, Wharton & Garrison to discuss the tax consequences of the sale of their Palais Royal stock. Pet. App. A8. Other attorneys from the same law firm represent Michael Milken in the present suit. Moselle Pollack's relationship to Judge Pollack and her interest in Palais Royal were evidently known to the tax attorneys at Paul Weiss. See *id.* at A56-A57 (1987 letter from tax partner regarding Palais Royal: "cc: Mrs. Milton Pollack").

[6] Some of Judge Pollack's sharp comments at the conference were a reaction to the conduct of the attorneys in raising the disqualification issue *ex parte* and without full investigation. Drexel's attorney – whose law firm was representing Drexel in the Palais Royal transaction and had had a copy of the Bain/Palais Royal contract since mid-August, see note 5, *supra* – acknowledged that he had not read the contract and still did not know precisely what it said. Pet. App. A78-A79; see also 9/13/88 Tr. 36. When Drexel's attorney stated that he had a "general understanding of who the parties are and what the obligation is" and referred to the limited basis for the information he had conveyed to Judge Pollack in the *ex parte* telephone call on Saturday, September 10 (Pet. App. A78), Judge Pollack said: "If you fellows had put that in an affidavit and come up on a Rule 11, you would have gotten whacked. You didn't make any investigation at all to find out what you were talking about before you approached a judge who was

c. One week later, after Judge Pollack denied requests by Drexel and petitioners to proceed with extensive discovery, they filed a motion requesting that Judge Pollack recuse himself because of his wife's interest in the Palais Royal transaction.[7] The motion was made chiefly under 28 U.S.C. 455(a), which provides: "Any justice, judge or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

At the time the motion was filed, there was no contract between Bain and Drexel. There was, however, a draft understanding, under which it was contemplated that Drexel would assist Bain in obtaining financing, by underwriting debt and by making a bridge loan from its own capital, and would be entitled to buy a percentage of the holding company that was newly formed to purchase the Palais Royal business (Specialty Holdings, Inc., or SHI). See Pet. App. A7; Moseley & McCarthy Aff. ¶¶ 6-8, 11 (Sept. 20, 1988). Under the contract between Bain and Drexel that was ultimately executed on November 1, 1988, Drexel underwrote $277 million in high yield debt to finance the purchase of the two companies; because only $90.5 million of the debt had been placed by that date, Drexel also agreed to extend a bridge loan to Bain of $186.5 million of its own funds. Pet. 3; see Moseley Suppl. Decl. ¶¶ 3-7 (Nov. 10, 1988). In return for its services, Drexel received substantial fees and was enabled to pur-

---

handling a lawsuit?" *Id.* at A79. The Judge also warned counsel that if they were to file a recusal motion "on the basis of insufficient information and failure to investigate and concealment of anything," they could anticipate his imposing appropriate sanctions on them. *Id.* at A81.

[7] That motion made no reference to the related private actions pending before Judge Pollack. It was not until a week later that petitioners and Drexel moved for Judge Pollack to disqualify himself from the private actions.

chase from Bain 8.5% of the equity in SHI, the newly formed purchasing company. See Pet. 3; Pet. App. A7, A47. Drexel's purchase of that stock, however, occurred after Mrs. Pollack and the other Palais Royal shareholders had become completely disassociated from Palais Royal; when they sold their stock to SHI, Bain was the sole owner of SHI. See *id.* at A7, A46.

d. On October 17, 1988, Judge Pollack denied the recusal motion, concluding that there was "no reasonable basis for doubting the Court's impartiality in this case by reason of the Palais Royal stock sale." Pet. App. A47. Judge Pollack found that Mrs. Pollack would be receiving no money from Drexel; that the only contract the selling shareholders had was with Bain (and with SHI, which was then a wholly owned subsidiary of Bain); that the Palais Royal shareholders had been excluded by Bain from any participation in dealings with prospective lenders, including Drexel; and that the selection of Drexel was to be "the unrestricted and voluntary choice to be made by Bain with which Palais Royal and its stockholders have nothing to say and no concern." *Id.* at A46-A47.[8]

---

[8] On October 10, 1988, prompted by the relationship between the Paul Weiss tax attorneys and the Palais Royal shareholders (see note 5, *supra*), Judge Pollack issued a show cause order against Paul Weiss and the individual attorneys in the firm representing Michael Milken. Stating that it appeared that the lawyers and firm "may have participated herein on the pending motions for recusal of the Court adversely to PALAIS ROYAL and its STOCKHOLDERS, WITH KNOWLEDGE, actual and imputed, of the confidential business [information]," the order directed the lawyers and firm to show cause why an investigation and hearing should not be held to determine (i) "whether [they] are proceeding herein in breach of fiduciary duties and obligations and with professionally conflicting interests in the pending matter seeking disqualification of the Court pursuant to 28 U.S.C. § [455] in respect to the interest of Palais Royal and its stockholders" and (ii) whether, if so, they should be required to withdraw

3. a. Petitioners, Drexel, and Maultasch thereupon filed a petition for a writ of mandamus in the court of appeals, asking that court to direct Judge Pollack to recuse himself. In a divided decision, the court denied the requested relief. Pet. App. A1-A22.

The court stated its belief that, "in light of the facts and circumstances that are known, a reasonable person would not conclude that the judge's impartiality could reasonably be questioned under § 455(a)." Pet. App. A20. The court added that its conclusion was "reinforced because of the particular procedural posture in which this case is before us as a petition for a writ of mandamus." *Ibid.* The court stated that "the exceptional remedy of mandamus will only be invoked where the petitioner has demonstrated that its right to such relief is 'clear and *indisputable.*' " *Id.* at A11 (quoting *Moses H. Cone Memorial Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 18 (1983), and *Allied Chemical Corp.* v. *Daiflon, Inc.*, 449 U.S. 33, 35 (1980)). If such a strict standard were not required, the court reasoned, mandamus challenges to a trial judge's refusal to disqualify himself "would become an effective tactic for harassment and delay." Pet. App. A11. In this case, the court concluded, the petitioners had "failed to establish the necessary clear and indisputable right to that extraordinary writ." *Id.* at A20.[9]

In assessing whether Judge Pollack's recusal was required under Section 455(a), the court of appeals applied an "objective [test that] assumes that a reasonable person

---

the recusal motion. Pet. App. A54-A55. The next day, Judge Pollack, without proceeding further, referred the matter to the Chief Judge of the District Court. *Id.* at A71-A72.

[9] The court of appeals also rejected the claims that disqualification was required under 28 U.S.C. 455(b)(1) and (4). Pet. App. A21-A22. Those claims, as to which there was no dissent in the court of appeals, are not renewed in this Court.

knows and understands all the relevant facts." Pet. App. A13. Given the facts of this case, the court found no basis for recusal: "Mrs. Pollack has had no business or other dealings with Drexel; she will receive no money from Drexel; and Drexel is not essential to the completion or success of the transaction. Moreover, there is no nexus, direct, indirect or otherwise, between the civil suits pending before Judge Pollack and Mrs. Pollack's interest in Palais Royal." *Id.* at A17.[10] The court concluded that the connection between Drexel and Judge Pollack was too remote, because "Drexel has no obligation direct or indirect to Mrs. Pollack," adding that the theory underlying the disqualification motion here "would mean that any remote connection even, for example, to investors who buy SHI bonds from Drexel would mandate recusal." *Id.* at A17-A18.

The court then discussed the assertions supporting the claim that Drexel's recusal motion was untimely and that the motion represented "an attempt by Drexel to manipulate the judicial process through judge-shopping." Pet. App. A18. The court did so, it explained, because "a reasonable person knowing all the facts and circumstances should consider [such assertions] in order to decide whether the failure to recuse was an abuse of sound judicial discretion." *Id.* at A18, A20. The court noted, however, that those assertions were not established facts. *Ibid.* "Consequently," the court stated, "our decision does not turn on these assertions." *Id.* at A20.

---

[10] In observing that Drexel was not essential to the transaction, the court of appeals, like the district court (Pet. App. A47-A48), relied on an affidavit by investment banker Lewis L. Glucksman, former head of Lehman Brothers Kuhn Loeb, stating that, based on Drexel's own analysis of the transaction, "a number of major investment banking firms could handle the placing of Bain's notes on terms comparable to those offered by Drexel." Pet. App. A17. See *id.* at A6.

b. Judge Lumbard dissented on the ground that Section 455(a) required disqualification. Pet. App. A22-A32. For him, "the inescapable relevant fact [was] that Drexel has been, and is now, retained by the firm which is under contract with Mrs. Pollack and members of her family to arrange financing for the cash purchase of Palais Royal, their family business, from which members of the family will receive over $84 million and Mrs. Pollack herself, and as trustee, will receive $30 million in cash." *Id.* at A23. Judge Lumbard concluded "that a reasonable person knowing these ultimate conceded facts would reasonably question Judge Pollack's ability to supervise such litigation impartially." *Ibid.*[11]

c. The court of appeals denied rehearing en banc. Four judges in the majority joined in an opinion that stressed the presence in the case of a judge-shopping issue, Drexel's formal undertaking of its financing obligation *after* the present suit was filed, and the high standard for mandamus relief, requiring a showing of a "clear and indisputable right." Pet. App. A34-A37.[12] The same four judges also joined a second opinion that, in addition to explaining that the panel had merely "applied well-settled rules to the specific facts of this case" (*id.* at A38), con-

---

[11] Judge Lumbard rejected the court's reliance on the absence of a connection between Drexel and Mrs. Pollack, stating that such reliance "exalt[ed] the form of the transaction over its substance" and that "it most certainly is the public perception that Mrs. Pollack is to be paid $30 million thanks to Drexel." Pet. App. A27, A28. In the circumstances, Judge Lumbard added, it was "irrelevant" that "there might have been others who would be interested in working on the deal." *Id.* at A28.

Judge Lumbard also stated his view that Judge Pollack's negative reaction to the recusal motion, including his show cause order, confirmed what he believed would be the reasonable person's doubts about Judge Pollack's ability to "act impartially in these cases." Pet. App. A23, A26-A27.

[12] That opinion also explained that Judge Pollack's issuance of the show cause order, while troublesome, did not require disqualification,

cluded that recusal was not required because the " 'flow' " of money "to Mrs. Pollack from Drexel * * * was much too indirect and circuitous a movement to lead reasonable, objective and impartial observers" to question Judge Pollack's impartiality (*id.* at A39). *Id.* at A37-A40.[13] The four dissenting judges pointed to two circumstances: Drexel's provision of financing for a transaction in which Mrs. Pollack received approximately $30 million (the transaction had by this time been completed); and Judge Pollack's referral of misconduct charges based on counsel's alleged breach of confidence owed to Mrs. Pollack. *Id.* at A40-A44.[14]

4. At petitioners' request, the court of appeals subsequently stayed the issuance of its mandate for 30 days. Pet. App. A51. Because the present petition was filed within that time, the stay continues in effect pending this Court's disposition of the petition. Fed. R. App. P. 41(b). As a result, there remains in place a stay of district court proceedings that had been entered on October 20, 1988. Pet. App. A53.

On April 14, 1989, shortly after petitioners filed their petition for a writ of certiorari, Drexel and Maultasch entered into comprehensive settlements with the Commission. Under the settlements, Drexel and Maultasch would

---

because the order was directed only at counsel and not at the parties, and because another judge would hear the matter. Pet. App. A36-A37.

[13] The opinion states: "the panel has ruled on all the significant issues pertaining to recusal that have been raised up to this point. Its conclusions merely were 'reinforced' by the stringent requirements for success on a mandamus petition." Pet. App. A40.

[14] The dissenters also stated that the recusal question would remain available for plenary review on direct appeal, because the panel had decided the recusal question only under special mandamus standards. Pet. App. A42. Moreover, they urged Judge Pollack to reconsider his decision in light, inter alia, of the details of the now-completed transaction and of the impending settlement between the SEC and Drexel. *Id.* at A43.

be permanently enjoined from violating the federal securities laws, and far-reaching relief would be provided to investors. The settlement with Drexel would require the company to install new personnel and management practices, to institute internal and external monitoring to prevent future violations of the securities laws, to cooperate with the Commission's continuing investigation, and to pay $350 million into a civil disgorgement fund to compensate persons with valid claims against Drexel for securities law violations.[15] In addition, pursuant to an agreement between Drexel and the United States Attorney for the Southern District of New York, the entry of a consent judgment with the Commission in the present matter is a precondition to resolving related criminal charges against Drexel. Under the criminal settlement, Drexel would enter guilty pleas to six counts charging securities and mail fraud and would pay an additional $300 million in penalties.

Under the court of appeals' stay of district court proceedings, the proposed consent decree could not be approved and entered by the district court. Accordingly, the day agreement was reached on the civil settlements, the Commission, Drexel, and Maultasch jointly asked the court of appeals to modify its stay of the district court proceedings for the purpose of allowing the district court to consider and, if appropriate, to enter and administer the proposed final judgments. The motion asked that Judge Pollack be permitted to enter and administer the settlements or, if that request were denied, that another district judge be allowed to do so pending disposition of the certiorari petition. In support of the motion, the Com-

---

[15] The settlement with Maultasch would bar him from the securities industry and require him to cooperate with the Commission's investigation.

mission's Director of Enforcement stated that prompt implementation of the proposed consent decree was essential "to protect the investing public from repetition of the conduct alleged in the Commission's complaint and to help ensure that Drexel will comply with the federal securities laws in the future." Lynch Aff. ¶ 3, (Apr. 13, 1989). Similarly, the Assistant United States Attorney handling the criminal charges against Drexel stated that a delay in entry of the final judgment against Drexel would produce a concomitant delay in entry of Drexel's guilty pleas to the criminal charges, which not only would postpone Drexel's cooperation in the continuing criminal investigation but also would mean that very soon the five-year federal statute of limitations would begin to bar prosecutions of certain persons and offenses involved in the investigation. Baird Aff. ¶¶ 3, 4 (Mar. 2, 1989).

On April 19, 1989, the court of appeals denied the joint motion, stating that its stay of the mandate would "remain in effect until the Supreme Court disposes of the case." The Commission and Drexel thereafter jointly asked the court to clarify whether, pending this Court's action, a judge other than Judge Pollack might be assigned to enter and administer the final judgment against Drexel. On April 26, 1989, the court adhered to its prior ruling, stating: "A decision to assign the case, or any part of it, to another judge rests with Judge Pollack or with those responsible for the assignment of cases in the United States District Court for the Southern District of New York * * *. That decision does not rest with us." App. A, *infra*. On April 27, 1989, the Commission and Drexel asked Chief Judge Brieant of the Southern District of New York to assign another judge to enter and administer the judgments. On May 4, 1989, the Assignment Committee of the Southern District denied the request. App. B, *infra*.

ARGUMENT

The court of appeals' decision rests on legal principles that are consistent with 28 U.S.C. 455(a), with this Court's recent decision in *Liljeberg* v. *Health Services Acquisition Corp.*, 108 S. Ct. 2194 (1988), and with well-established standards for mandamus relief. No other court of appeals has repudiated those principles. Petitioners' challenge to the court of appeals' decision is, at bottom, simply a disagreement with the court's application of those principles to the particular facts presented here. That fact-specific complaint does not call for this Court's review.

1. Petitioners contend (Pet. 9-14) that the decision of the court of appeals misconstrues the standards for applying 28 U.S.C. 455(a), is inconsistent with this Court's decision in *Liljeberg*, and conflicts with the decisions of other courts of appeals. Those contentions are incorrect.

a. Petitioners first attempt to find an important legal issue in the court of appeals' decision by suggesting (Pet. 9) that the decision "focuses on the perceptions of a super-sophisticated person who is presumed to know and understand all financial and legal nuances—including the hoary doctrine of contractual privity." That suggestion mischaracterizes the court's analysis. The court ruled against petitioners because it concluded that a reasonable person, knowing all of the objectively ascertainable facts, would not question Judge Pollack's impartiality. Thus, the court, in explaining the standards to be applied, stated that the test under Section 455(a) "is an objective one which assumes that a reasonable person *knows and understands all the relevant facts.*" Pet. App. A13. And in applying Section 455(a) to the facts here, the court in no way departed from the fully informed, reasonable person inquiry. *Id.* at A17-A20. Contrary to petitioners' sugges-

tion, at no point did the court adopt a "purely legalistic perspective."[16]

The approach taken by the court of appeals is correct. Congress intended that Section 455(a) be applied by asking the question put by the court of appeals—what would a reasonable, fully informed person think about the judge's impartiality? See *ibid.*; H.R. Rep. No. 1453, 93d Cong., 2d Sess. 5 (1974); S. Rep. No. 419, 93d Cong., 1st Sess. 5 (1973). This Court in *Liljeberg* applied the same standard. The Court affirmed the court of appeals' ruling that "a reasonable person, knowing the relevant facts" (108 S. Ct. at 2197) would question the judge's impartiality; and the Court came to the conclusion that a violation had occurred, and that retroactive relief was required, based on an assessment of the objectively ascertainable facts on which a reasonable observer might base an assessment of the risks of judicial bias (see 108 S. Ct. at 2202, 2205-2206). Nothing in *Liljeberg* remotely suggests that disqualification might be required because an ill-informed lay person might suspect the worst of a judge.[17]

---

[16] The court of appeals disagreed with Judge Lumbard's statement that recusal must not be judged " 'from a purely legalistic perspective.' " Pet. App. A14 (quoting *id.* at A28)). As the court's opinion makes perfectly clear, however, its disagreement was not a rejection of the fully informed, reasonable person standard. Rather, the court explained that what it understood Judge Lumbard to mean, and what it was rejecting, was the suggestion that recusal must be judged based on what a less-than-fully informed person would surmise about the judge's impartiality. "Like all legal issues, judges determine appearance of impropriety—not by considering what a straw poll of the only partly informed man-in-the-street would show—but by examining the record facts and the law, and then deciding whether a reasonable person knowing and understanding all the relevant facts would recuse the judge." *Ibid.*

[17] Of course, contrary to petitioners' suggestion (Pet. 13), the *Liljeberg* Court did not assume that the reasonable objective observer

b. Petitioners also err in arguing (Pet. 10-11) that the court of appeals' discussion of the possibility of judge-shopping by the defendants (Pet. App. A18-A20) creates a legal issue warranting this Court's review. As an initial matter, not even petitioners suggest that this issue meets the ordinary requirements for review of a legal question by this Court—*e.g.*, an intercircuit conflict, or an actual or likely impact on other cases. In any event, the court of appeals did not rest its decision on allegations of judge-shopping.[18] The court, after relying on the facts of the Palais Royal transaction and the remoteness of any connection between Drexel and Mrs. Pollack, carefully pointed out that it was discussing the allegations in order to fill in the background that the statutorily required objective observer would take into account in judging recusal (*ibid.*), and it expressly stated: "our decision does not turn on these assertions." *Id.* at A20.

---

knew that the trial judge had in fact forgotten about his interest in the litigation. It is only the " 'objectively ascertainable' " (108 S. Ct. at 2202) facts that the statutorily required *observer* must assume in assessing the situation. As *Liljeberg* establishes, the appearance standard of Section 455(a) cannot depend on subjective facts about a judge's mental state. That hardly means, however, that disqualification can be based on less than complete knowledge of the objective facts.

For the same reason that petitioners are wrong in claiming that the court of appeals' approach conflicts with the approach taken in *Liljeberg*, petitioners' assertion that the decision below conflicts with decisions of other courts of appeals (Pet. 13-14) founders on their mischaracterization of the inquiry conducted by the court of appeals. Neither *In re Faulkner*, 856 F.2d 716 (5th Cir. 1988), nor *Parker* v. *Connors Steel Co.*, 855 F.2d 1510 (11th Cir. 1988), the decisions relied on by petitioners, suggests that the standard should be anything other than whether a reasonable, fully informed person would question a trial judge's impartiality.

[18] It is worth noting that the allegations are not, as petitioners suggest (Pet. i, 6, 11), "unsubstantiated." It is true that the courts below

Hence, petitioners are wrong in suggesting (Pet. 11) that the court's decision stands for the proposition that allegations of misconduct are to be "weigh[ed]" or "balanced against the appearance of judicial bias." Rather, as stated by Judge Pierce in explaining why en banc review was not warranted, the court's discussion of the misconduct allegations stands only for the proposition that such allegations are "a significant contextual matter" that "places upon this court the burden of scrutinizing with exceptional care the petitioners' efforts to have the district judge disqualified." Pet. App. A35. As so understood within the Second Circuit itself, the court's discussion is wholly unobjectionable and certainly not an issue for this Court's review.[19]

c. Petitioners further argue (Pet. 11-13) that this Court's review is demanded because the decision below conflicts with the Court's decision in *Liljeberg*. But, as we

---

did not make a finding on the general question whether petitioners and the Drexel defendants engaged in "judge-shopping." But, as shown above, the factual basis for the allegations, as set forth by the court of appeals (Pet. App. A18-A20), is largely undisputed.

[19] The Committee Reports accompanying the 1974 amendments to Section 455 explain:

> [I]n assessing the reasonableness of a challenge to his impartiality, each judge must be alert to avoid the possibility that those who would question his impartiality are, in fact, seeking to avoid the consequences of his expected adverse decision. Disqualification for lack of impartiality must have a *reasonable* basis. Nothing in this proposed legislation should be read to warrant the transformation of a litigant's fear that a judge may decide a question against him into a "reasonable fear" that the judge will not be impartial. Litigants ought not to have to face a judge where there is a reasonable question of impartiality, but they are not entitled to judges of their own choice.

H.R. Rep. No. 1453, 93d Cong., 2d Sess. 5 (1974); S. Rep. No. 419, 93d Cong., 1st Sess. 5 (1973).

have already explained, the court of appeals in no way departed from the legal standards elaborated in *Liljeberg*. Nor does this case involve any question of the trial judge's subjective awareness of a disqualifying circumstance or, indeed, of the proper remedy for an adjudicated violation—the two issues that were presented in *Liljeberg*.

Moreover, the facts involved in *Liljeberg* are markedly different from those presented here. Notably, in *Liljeberg*, once the trial judge's subjective state of mind was ruled irrelevant, the case (from the outside observer's standpoint) involved a judge with a direct financial interest (as a fiduciary) in the dispute that was the subject of the litigation, in violation of Section 455(b)(4). See 108 S. Ct. at 2206. By contrast, petitioners do not even contend in this Court that Judge Pollack actually has an interest in the outcome of the present case or that this Court should find that disqualification is required except under Section 455(a)'s appearance test.

The disputed issue in the present case (putting aside the question of standards for mandamus relief) is whether there was a sufficient connection between Drexel and Mrs. Pollack through the Palais Royal transaction so as to create a disqualifying appearance of partiality. At bottom, petitioners ask this Court to grant their petition simply to disagree with the court of appeals' and district court's narrow, fact-dependent answer to that question. Because there was no privity or other legal relationship beween Drexel and Mrs. Pollack, the question whether their connection called for recusal presented no occasion for application of a bright-line rule, but was a question of degree. The court of appeals concluded that the connection was too remote, explaining that Mrs. Pollack had no interest in who Bain selected to provide it with financing and that Drexel was not indispensable to the transaction.

Pet. App. A17. That conclusion, which was examined with evident care by the full Second Circuit, does not warrant this Court's review.

2. Petitioners seek this Court's review of the standards for mandamus review of a trial judge's denial of a disqualification motion. Pet. 15-20. They argue that the court of appeals erred, and departed from the standards applied by three other courts of appeals, in requiring petitioners to demonstrate a clear and undisputable right to disqualification of the trial judge in order to justify the granting of their mandamus petition. This contention is incorrect and does not merit this Court's review.

To begin with, it is not clear that the mandamus standard made a difference to the court of appeals' decision in this case. Thus, while the court of appeals stated in its analysis that it must apply the special mandamus standard (Pet. App. A10-A12), in its conclusion the court simply stated that recusal was not warranted by the facts of this case, adding that the conclusion was "reinforced" by the procedural posture of the case (*id.* at A20).[20] Similarly, because of the distinctive character of the judgment required under Section 455(a)—a highly fact-specific judgment about how an objective observer might view the situation—it is hardly clear to what extent the special "clear and indisputable right" standard for mandamus relief actually makes a difference to the outcome of disqualification cases in general. Petitioners' challenge to the proper standard for such relief, therefore, has an abstract quality that counsels against this Court's review.

---

[20] As noted above, the opinions on denial of rehearing en banc took somewhat different views of whether the court of appeals settled the recusal question as it would be presented without the special mandamus standard. Compare Pet. App. A40 with *id.* at A42.

In any event, the court of appeals' decision correctly follows well-established mandamus principles and precedent. Based on the longstanding congressional policy against piecemeal litigation, it is well established that mandamus relief is generally not available unless the petitioner demonstrates a clear and indisputable right to the relief sought. As this Court has explained on several occasions,

> it is in the interest of the fair and prompt administration of justice to discourage piecemeal litigation. It has been Congress' determination since the Judiciary Act of 1789 that as a general rule appellate review should be postponed * * * until after final judgment has been rendered by the trial court. A judicial readiness to issue the writ of mandamus in anything less than an extraordinary situation would run the real risk of defeating the very policies sought to be furthered by that judgment of Congress.

Kerr v. *United States Dist. Court*, 426 U.S. 394, 403 (1976) (citations omitted). Accord *Allied Chemical Corp.* v. *Daiflon, Inc.*, 449 U.S. 33, 35 (1980) (per curiam). Thus, as the Court reaffirmed most recently in *Mallard* v. *United States Dist. Court*, No. 87-1490 (May 1, 1989), slip op. 12, mandamus petitioners must "carry 'the burden of showing that [their] right to issuance of the writ is "clear and indisputable." ' " See also *Gulfstream Aerospace Corp.* v. *Mayacamas Corp.*, 108 S. Ct. 1133, 1143 (1988); *Moses H. Cone Memorial Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. at 6; *Allied Chemical Corp.* v. *Daiflon, Inc.*, 449 U.S. at 35; *Will* v. *Calvert Fire Insurance Co.*, 437 U.S. 655, 662 (1978); *Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379, 384 (1953); *United States* v. *Duell*, 172 U.S. 576, 582 (1899).

It is not disputed in this case that interlocutory mandamus relief may be available in proper circumstances in

judicial disqualification cases.[21] And petitioners offer no good reason for departing from the ordinary mandamus standard for judicial disqualification cases. All of their

---

[21] This Court has not directly ruled on that question. In *Ex parte American Steel Barrel Co.*, 230 U.S. 35 (1913), the Court denied a request for mandamus ordering reinstatement of a trial judge without addressing the question, ruling that "[t]he writ of mandamus will be granted by this court only when it is clear and indisputable that there is no other legal remedy" and stating that review was possible "in due course of law," presumably on appeal from a final judgment. 230 U.S. at 45. In *Mallard*, the Court recently reiterated the general rule that mandamus petitioners "must show that they lack adequate alternative means to obtain the relief they seek." Slip op. 12.

Virtually every circuit has found mandamus to be an appropriate remedy for erroneous denial of recusal motions in proper circumstances. See *In re United States*, 666 F.2d 690 (1st Cir. 1981); *In re Beard*, 811 F.2d 818 (4th Cir. 1987); *In re Placid Oil Co.*, 802 F.2d 783 (5th Cir. 1986); *Pepsico, Inc.* v. *McMillen*, 764 F.2d 458 (7th Cir. 1985); *Scarrella* v. *Midwest Federal Savings & Loan*, 536 F.2d 1207 (8th Cir.), cert. denied, 429 U.S. 885 (1976); *In re Cement Antitrust Litig.*, 673 F.2d 1020 (9th Cir. 1982), aff'd, 459 U.S. 1190 (1983); *Bell* v. *Chandler*, 569 F.2d 556 (10th Cir. 1978). See also *United States* v. *0.21 Acres of Land*, 803 F.2d 620 (11th Cir. 1986); *Mitchell* v. *Sirica*, 502 F.2d 375 (D.C. Cir.), cert. denied, 418 U.S. 955 (1974); 13A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3553, at 660-661 (1984). But see *Pittsburgh* v. *Simmons*, 729 F.2d 953, 954 (3d Cir. 1984) ("A refusal to recuse is reviewable only after final judgment."); see also *Cleveland* v. *Krupansky*, 619 F.2d 576, 578 (6th Cir.), cert. denied, 449 U.S. 834 (1980) ("The order entered by a District Judge refusing to disqualify himself is not reviewable upon appeal until a final judgment has been entered in the case.").

This issue is not presented for review here. (Of course, if mandamus is not available, then the decision by the court of appeals to deny mandamus relief was correct.) We do not dispute the availability of mandamus relief in proper circumstances. Moreover, there is no doubt of the courts' *jurisdiction* to grant relief under 28 U.S.C. 1651; the conflict goes only to the proper occasions for its exercise. See *La Buy* v. *Howes Leather Co.*, 352 U.S. 249, 254-255 (1957).

arguments (Pet. 17-18) come down to the proposition that applying the ordinary mandamus standard may result in a trial being held whose outcome is eventually overturned on appeal. That, however, is the necessary consequence of the congressional policy disfavoring interlocutory appeals and does not distinguish disqualification motions from numerous other motions routinely made during and before trial. Indeed, this Court has noted—in discussing the possible harm caused by requiring a party to wait until final judgment before appealing an adverse ruling on a motion to disqualify counsel—that such harm "does not 'diffe[r] in any significant way from the harm resulting from other interlocutory orders that may be erroneous, such as orders requiring discovery over a work-product objection *or orders denying motions for recusal of the trial judge.*' " *Firestone Tire & Rubber Co.* v. *Risjord,* 449 U.S. 368, 378 (1981) (citation omitted; emphasis added).[22]

---

[22] Petitioners are incorrect in their suggestion (Pet. 16-17) that the court of appeals' insistence on the " 'extraordinary' nature of mandamus relief" is inconsistent with the "even more 'extraordinary' procedural circumstances" that prompted this Court in *Liljeberg* to vacate the trial court's judgment pursuant to Fed. R. Civ. P. 60(b)(6). In fact, similar concerns underlie both the standard for mandamus relief and the requirements for relief under Rule 60(b)(6). Both Congress and this Court, in adopting Rule 60(b), made the determination that, under certain circumstances, the policy in favor of the finality of judgments should give way to other compelling concerns. With respect to Rule 60(b)(6), this Court requires a showing of "extraordinary circumstances" before relief may be granted. *Liljeberg,* 108 S. Ct. at 2204, citing *Klapprott* v. *United States,* 335 U.S. 601, 614-615 (1949), and *Ackermann* v. *United States,* 340 U.S. 193, 200 (1950). See also *Liljeberg,* 108 S. Ct. at 2209 (Rehnquist, J. dissenting) (requirement that relief will be granted under Rule 60(b)(6) only upon a showing of extraordinary circumstances "is essential if the finality of judgments is to be preserved"). Similarly, this Court's insistence that a writ of mandamus is an "extraordinary remedy" available only upon a showing of

Nothing in the legislative history of the 1974 amendments to Section 455 suggests any intention on the part of Congress to create a special category of interlocutory appellate review for recusal cases. To the contrary, permitting such review would undermine the balance Congress sought to achieve. Congress was concerned that the public should perceive the courts as being free of bias, but Congress was also concerned that spurious recusal motions would have a disruptive effect on the proper functioning of the judicial system and that use of the recusal statute for judge-shopping would in itself impair public confidence. See H.R. Rep. No. 1453, *supra*, at 5. As the court of appeals appropriately concluded, if a less rigorous standard were to be applied, "mandamus applications to review a judge's refusal to recuse would become an effective tactic for harassment and delay." Pet. App. A11. The ordinary standard requiring a clear and indisputable right to relief strikes the proper balance in the present setting as it does in other settings.

Finally, petitioners[x] contend (Pet. 18-20) that review is warranted because three circuits have rejected the "clear and indisputable right" standard for mandamus review of trial judges' denial of disqualification motions. To the contrary, two of the referenced circuits—the Fourth and Fifth—have in fact expressly required that a party seeking mandamus review of a district court's recusal decision must establish a "clear and indisputable" right to the requested relief. *In re Beard,* 811 F.2d 818, 826 (4th Cir. 1987); *In re Placid Oil Co.,* 802 F.2d 783, 786 (5th Cir.

"clear and indisputable" entitlement to such relief is grounded in the policy that appellate review should be postponed until after the trial court renders its final judgment. See *Kerr* v. *United States Dist. Court,* 426 U.S. at 403; *Allied Chemical Corp.* v. *Daiflon, Inc.,* 449 U.S. at 35.

1986). And neither *In re Rodgers,* 537 F.2d 1196 (4th Cir. 1976), nor *In re Faulkner,* 856 F.2d 716 (5th Cir. 1988), which petitioners cite as examples of a "less stringent standard" (Pet. 19) in those circuits, enunciates any contrary standard for mandamus review.

In the Seventh Circuit, also asserted by petitioners to be in conflict with the Second Circuit here, the proper standard for mandamus review of disqualification denials simply has not been settled. To be sure, the Seventh Circuit has held that Section 455(a) rulings may be reviewed only by mandamus and not on direct appeal (*Durhan* v. *Neopolitan*, No. 88-2108 (Apr. 20, 1989), slip op. 12; *Union Carbide Corp.* v. *U.S. Cutting Service, Inc.*, 782 F.2d 710, 712-713 (1986); *United States* v. *Balistrieri,* 779 F.2d 1191, 1204-1205 (1985), cert. denied, 475 U.S. 1095 (1986)), and it has stated that it will "interpret generously our power to issue the writ [of mandamus]" in recusal cases (*Union Carbide Corp.*, 782 F.2d at 713). The Seventh Circuit has, however, never repudiated the "clear and indisputable right" standard for mandamus review in disqualification cases. Indeed, in *Union Carbide* itself, the court stated that mandamus would be denied in "routine" cases, and its statement about the "generous" interpretation of the mandamus power applies by its terms only to "serious" recusal questions. 782 F.2d at 712, 713. Moreover, in *United States* v. *Horak*, 833 F.2d 1235 (7th Cir. 1987), which was not itself a judicial recusal case, the court cited a judicial recusal mandamus case in affirming that mandamus is an " 'extraordinary remedy' " available only to a party that demonstrates a " 'clear and indisputable' " right to it. *Id.* at 1248-1249, citing *Pepsico, Inc.* v. *McMillen,* 764 F.2d at 458 (7th Cir. 1985) (not itself discussing standard for mandamus relief). In short, petitioners are wrong in asserting that there is a conflict over

mandamus standards in recusal cases between the Seventh and Second Circuits, let alone in implicitly suggesting that there is a conflict sufficiently concrete and developed to warrant this Court's review.[23]

---

[23] Neither the Seventh Circuit nor any other circuit has suggested, as petitioners seem to urge (Pet. 15-18), that the standard for review on mandamus in recusal cases should be the same as the standard on appeal. Moreover, petitioners' suggestion (*id.* at 15-16) that "abuse of discretion" is not the proper standard for appellate review of judicial disqualification decisions is squarely contradicted by the legislative history of the 1974 amendments to Section 455:

> [T]he proposed legislation * * * is not designed to alter the standard of appellate review on disqualification issues. The issue of disqualification is a sensitive question of assessing all the facts and circumstances in order to determine whether the failure to disqualify was an abuse of sound judicial discretion.

H.R. Rep. No. 1453, *supra,* at 5; S. Rep. No. 419, *supra,* at 5. Petitioners' suggestion has also been rejected by every court of appeals that has addressed the issue. See, *e.g., United States* v. *Wilensky*, 757 F.2d 594, 599-600 (3d Cir. 1985); *Gilbert* v. *Little Rock,* 722 F.2d 1390, 1399 (8th Cir. 1983), cert. denied, 466 U.S. 972 (1984); *Phillips* v. *Joint Legislative Committee,* 637 F.2d 1014, 1021 (5th Cir. 1981), cert. denied, 456 U.S. 960, 456 U.S. 971 (1982); *Blizard* v. *Frechette*, 601 F.2d 1217, 1221 (1st Cir. 1979); *S.J. Groves & Sons Co.* v. *International Brotherhod of Teamsters, Local 627,* 581 F.2d 1241, 1248 (7th Cir. 1978).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General

DANIEL L. GOELZER
General Counsel

PAUL GONSON
Solicitor

JACOB H. STILLMAN
Associate General Counsel

ROSALIND C. COHEN
Assistant General Counsel

KATHARINE GRESHAM
Special Counsel
Securities and Exchange Commission

MAY 1989

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 88-3060

IN RE DREXEL BURNHAM LAMBERT INCORPORATED, THE DREXEL BURNHAM LAMBERT GROUP INCORPORATED, MICHAEL R. MILKEN, LOWELL J. MILKEN, CARY J. MAULTASCH, AND PAMELA R. MONZERT,

PETITIONERS

[Filed Apr. 26, 1989]

We have been asked to reconsider or to clarify our order of April 19, 1989 denying a joint motion to modify the stay of the proceedings filed by Drexel Burnham Lambert Inc., The Drexel Burnham Lambert Group Inc. (collectively "Drexel"), the Securities and Exchange Commission ("The SEC") and Cary J. Maultasch.

It is HEREBY ORDERED that the order of April 19, 1989 remains in effect.

1. In their April 14 motion papers seeking modification of the stay, Drexel, the SEC and Maultasch requested that Judge Pollack be allowed to consider the settlement agreement Drexel and the SEC had reached, but stated that neither they nor the three individuals who have applied to the Supreme Court for a writ of certiorari—Michael Milken, Lowell Milken and Pamela Monzert ("the Milken group")—would object to the agreement being considered by another district judge. We denied the motion on the ground that in order to give meaning to the stay of the underlying proceedings, we are

obligated by Federal Rule of Appellate Procedure 41(b) to preserve the status quo with regard to the interests of the Milken group, which may be adversely affected by the settlement agreement.

2. In their motion for reconsideration and clarification, Drexel and the SEC note that our April 19 order made no reference to the possibility of another district judge considering the proposed settlement agreement. They argue that our stay in this case "is focused only on the ability of Judge Pollack to act in this case and should not prevent the parties from presenting [the proposed] settlement to another judge."

3. As Drexel itself, along with the SEC, stated in their April 14 motion papers, "[t]he Court's decision that Judge Pollack may continue to preside in this case is the law of the case." Judge Pollack is entitled to remain in this case, absent a Supreme Court ruling to the contrary, or new facts which would warrant his recusal. A decision to assign the case, or any part of it, to another judge rests with Judge Pollack or with those responsible for the assignment of cases in the United States District Court for the Southern District of New York in accordance with that court's rules regarding assignment of judges for the division of business. That decision does not rest with us.

4. Nor, as Drexel and the SEC seem to believe, does the decision rest with the parties in the case. The fact that the SEC has changed its position, and is now willing to accept another judge, does not mean that Judge Pollack may be bypassed. Consensus among the parties that they would prefer a different judge is not a sufficient reason for a reviewing court to oust a judge already assigned.

5. So long as Judge Pollack remains assigned to this case, we must accept his position as part of the status quo. It was in this context that we ruled earlier that the Milken

group has a right to have the Supreme Court determine whether Judge Pollack should remain in the case before he is allowed to consider a proposed settlement which may affect the interests of the Milken group. We adhere to that ruling.

/s/ J. Edward Lumbard
HONORABLE J. EDWARD LUMBARD

/s/ Richard J. Cardamone
HONORABLE RICHARD J. CARDAMONE

/s/ Lawrence W. Pierce
HONORABLE LAWRENCE W. PIERCE

Circuit Judges.

4/26/89
Date

N.B. This summary order will not be published in the Federal Reporter and should not be cited or otherwise relied upon in unrelated cases before this or any other court.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

88 Civ. 6209-MP

SECURITIES AND EXCHANGE COMMISSION, PLAINTIFF

v.

DREXEL, BURNHAM, LAMBERT, INCORPORATED, ET AL., DEFENDANTS

MEMORANDUM AND ORDER OF THE ASSIGNMENT COMMITTEE

Plaintiff, together with defendants Drexel, Burnham, Lambert, Incorporated, and the Drexel Burnham Lambert Group, Inc. (collectively "Drexel"), have applied by written submission to the Court to reassign this action in part and temporarily for the purpose of permitting the Court to rule on two proposed consent judgments, one of which has been agreed to between the Commission and Drexel, and the other between the Commission and the defendant Maultasch. The thrust of the request is that this reassignment would apply solely for the purpose of having the consent judgments adjudicated by the Court, and administered under the supervision of a judicial officer during such time when Judge Milton Pollack of this Court, to whom this action has previously been assigned for all purposes, is stayed from participation by the Court of Appeals. That stay is based on the pendency of a petition for *certiorari*, described below, filed in the Supreme Court by other parties to this litigation. Such petition is not yet fully submitted for decision.

The Assignment Committee has convened and considered the written submissions herein, and has also communicated with the Honorable Milton Pollack. The docket of Judge Pollack is entirely current. He advises that he is ready, willing and able to entertain a joint application to have these judgments entered, and if approved, administered. He would act forthwith with respect thereto but for the stay presently in effect by the Court of Appeals of the Second Circuit, pending a petition for *certiorari* to the Supreme Court of the United States to obtain its review of an *en banc* decision of the Second Circuit declining to issue an order disqualifying Judge Pollack pursuant to 28 U.S.C. Section 455. The familiarity of the reader with all proceedings heretofore had herein is assumed.

The disqualification motion, with respect to which the Assignment Committee has no jurisdiction, was decided in the first instance by Judge Pollack in the regular course of this litigation in the District Court. The Court of Appeals declined to grant mandamus to compel a different result.

Judge Pollack has not requested of this Committee that all or any part of this action be assigned to another Judge, and gives us no present indication of intending to do so.

Our Court Rules for the Division of Business Among District Judges, familiarity with which is assumed, provide for an Individual Assignment System "to assure continuous and close judicial supervision of every case." The System is administered by the Assignment Committee acting pursuant to the Rules for the Division of Business and the statutory power of the District Court to provide for the division of its business pursuant to 28 U.S.C. Section 137. Under Rule 18 of those Rules, our Committee would be required to transfer this case by lot if Judge Pollack had granted the motion to disqualify him from presiding, or if

the Court of Appeals had made such a direction. Since Judge Pollack has not been disqualified and has made no request for a transfer, there can be no transfer under that Rule. Judge Pollack is still the Judge assigned to the case under our Rules.

The Court of Appeals stay, under Appellate Rule 41(b), is now in effect, solely pending the outcome of the attempt to obtain Supreme Court review. This is a stay not merely against Judge Pollack; but a stay of proceedings in the *District Court.* However, the SEC and Drexel now rely on language in an order of the Court of Appeals dated April 26, 1989 denying a motion to modify the stay:

> Judge Pollack is entitled to remain in this case, absent a Supreme Court ruling to the contrary, or new facts which would warrant his recusal. A decision to assign the case, or any part of it, to another judge rests with Judge Pollack or with those responsible for the assignment of cases in the United States District Court for the Southern District of New York in accordance with that court's rules regarding assignment of judges for the division of business. That decision does not rest with us.

It is now urged by the SEC and Drexel that the Assignment Committee should, in reliance on this language, reassign the case to another judge for the limited purpose of entering and administering the consent judgments.

It is also suggested that Judge Pollack is "unavailable" within the meaning of Rule 5, which provides that, where the assigned judge is "unavailable due to extraordinary circumstances", a matter relating to his case may be heard by the Part I judge. Judge Pollack is not unavailable in the sense intended by this Rule.

Provisions found in the aforementioned Rules for the reassignment of a case or cases, absent a request by or dis-

qualification of the assigned judge, are of limited scope. They are found only in Rule 19, which calls for reassignment by the Assignment Committee on its own initiative "in the case of death or resignation, in the event of prolonged illness, disability, unavoidable absence of an assigned judge, or the build-up of an excessive backlog." No such circumstance exists here.

Our scrupulous adherence to the Rules adopted by the Court is essential to the integrity of the Court. Such adherence serves to prevent manipulation in the assignment or reassignment of Judges.

Judge Pollack is the regularly assigned judge in this case. Judge Pollack has denied a contested application to remove him from the case, and his refusal to withdraw has been reviewed by the Court of Appeals. No circumstance has arisen which under our Rules for the Division of Business would make it appropriate to reassign the case or any part of it to another judge.

Problems arising during the course of, or as a result of the denial of a motion to disqualify an assigned judge, are properly dealt with by the normal and customary litigation process in the District Court and the higher courts. Accordingly, it seems inappropriate for the Assignment Committee to inject itself into, or serve as an alternative to, the litigation process. It would be particularly unwarranted in this case when the parties moving for the disqualification of Judge Pollack have so far failed to achieve that very same result, and the requested action is approval of an agreement which the Court of Appeals has determined may adversely affect other defendants in the case.

We find no basis to conclude from the submissions before us that such delay, which may result from awaiting action by the Supreme Court, will affect the public interest adversely.

We hereby direct that there shall be no reassignment of all or part of this case at this time, and that no application with respect thereto shall be entertained in Part I.

So Ordered.

Dated: May 4, 1989
New York, New York

For The Assignment Committee

Charles L. Brieant, Chief U.S.D.J.
Chairman

Thomas P. Griesa, U.S.D.J.,
Member

Louis L. Stanton, U.S.D.J.,
Member

☆ U.S. GOVERNMENT PRINTING OFFICE: 1989—241-699/00251